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Critics on the Deductive Model of Judicial Decision in Herbert Hart's 1949 and 1958 Works

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This article considers defects / limitations of a logical-deductive model of judicial decision (prevalent in continental jurisprudence) which are presented in "early" (and more rarely discussed) conceptions of a prominent British philosopher H.L.A. Hart: his 1949 doctrine of ascriptivism and defeasibility of concepts and 1958 doctrine of legal indeterminacy. According to the philosopher, a deductive model does not give a proper explanation of: a) a nature and functions of legal speech acts; b) a method and peculiarities of establishing connection between legal concepts and their referents; c) openness and complexity of grounds of judicial reasoning; d) a limited role of logical tools in making a legal conclusion; etc. At the same time the distinctive judicial and alike statements are interpreted by Hart as conclusions of law, i.e. as inferences arising from norms and facts. Hence, contrary to the author's assertions, he actually denies not a judicial deduction per se, but rather its certain kind, status and claims to universality. Therefore this allows applying logical apparatus to law and judicial decision while accounting for their limited role in legal and social practice, and so in theory and methodology of jurisprudence.

Keywords: H.L.A. Hart, judicial decision, logic in law, legal language, ascriptivity, defeasibility, indeterminacy in law, analytical philosophy of law, formalism, legal positivism.

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Introduction. Studies of philosophical-legal views of a prominent British philosopher, professor of Oxford, Herbert Hart (1907–1992) are widely represented in foreign literature. Similar inquiries (though quite small in number) are also present in the Russian theory (Drobyshevskii, 2015; Grafskii, 2012; Kozlikhin, Poliakov, Timoshina, 2015; Didikin, Ogleznev, 2012; Kasatkin, 2014; etc.). In this article we focus on a rarely emphasized aspect of Hart's work: his critics on a logical-deductive model of judicial decision (widespread in continental jurisprudence). We will turn to two examples of the author's criticism preceding his basic treatise *The Concept of Law*

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(1961) (Hart, 1994). These are Hart's 1949 essay *The Ascription of Responsibility and Rights* (Hart, 1951) and his 1958 essay *Positivism and the Separation of Law and Morals* (Hart, 1983b). Although these papers receive significantly less attention from researchers, they are seemed to fix important aspects of the topic in question.

The concept of ascriptivity and defeasibility (1949). Let us begin with the 1949 essay where the problems of legal/judicial decision are considered by the author within a context of general criticism of the so-called "*descriptive fallacy*" (understanding of language as a machinery of descriptions, a project of empirically and logically determined epistemology (Austin, 1962)) – criticism exercised from a standpoint of analytical linguistic philosophy.

Hart challenges a vision of law as a descriptive-deductive system of concepts correlated with external objects by means of formulas that define universal conditions of the concepts' applicability, and rejects a resulting deductive interpretation of judicial decision (Hart, 1951, S. I). According to the author, this approach ignores specific features of a legal/judicial discourse (and a socio-normative discourse in general). Among those features he names an ascriptive, vague and defeasible nature of legal concepts (and relevant utterances).

1) *Ascriptivity* is understood by Hart in two ways. On the one hand, it is a "non-factual" character of basic legal (and all "social", institutional) concepts, such as property, action, contract, crime, right, duty, etc., i.e. their lack of direct empirical referents (Ibid., S. III; Hart, 1983a, S. I–III). On the other hand, it is a special speech function of legal and similar ordinary utterances (in a spirit of J.L. Austin's "performatives" (Austin, 1962)), which consists in ascribing rights, responsibilities and so on (Hart, 1951, Intro, S. II–III), or, in other words, in producing speech acts with rules or in making normative conclusions (Hart, 1983a, S. II–III). In this context distinctive judicial utterances ("It's yours", "He did it", etc.), in Hart's view, constitute speech actions based on the existing norms, claims and evidences irreducible to a description and evaluated by their appropriateness (legitimacy, validity, "felicity" and so forth). They have a complex structure (not identical with a structure of a traditional description) representing a compound or a blend of (empirical) a fact and a norm (a set of legal norms). In the framework of such acts a socio-normative/conventional status and consequences are ascribed to certain observable states of affairs (which, e.g., is evident from a difference between concepts like "a piece of earth" and "a piece of property", "a human movement" and "a human action", etc.) (Hart, 1951, S. III). Thus, according to Hart, a judicial decision is not a descriptive statement deduced from a statement of a fact: a timeless legal conclusion ("Smith is guilty of murder") does not follow from its supporting statements about a temporary fact ("Smith put arsenic in his wife's coffee on the 1st of May, 1944"), and the rules of law are not the linguistic or logical rules, but to a great extent are the rules for deciding (i.e. for making legal conclusions) (Ibid., p. 156).

2) *Vagueness* – an indeterminacy of terminology of a (precedent) legal system, its lack of strict conclusive definitions, and broad judicial discretion in establishing grounds of a decision (ratio decidendi) and their proximity to new cases. In Hart's opinion, this feature prevents composing a clear closed list of reasons for application a legal term (or giving its universal definition or paraphrase). So establishing a meaning of legal concepts is possible only through an appeal to past precedents (exemplary cases of the concepts' usage) in conjunction with the phrase "et cetera", i.e. in unity with a statement of openness and possible novelty of their future uses (Ibid., p. 147). This, in turn, undermines consistency of a

deductive account of law and judicial decision. Such deduction (when it is said that, given the existing law, some statement of facts found by a judge entails some legal conclusion), according to Hart, is possible only in respect of the most "simple" cases, where except questions of fact no other issues arise, above all issues of meaning or interpretation of a relevant legal rule (Ibid., p. 156).

2) *Defeasibility* – presumed applicability and voidability of legal concepts, i.e. a possibility of nullification or correction of an original statement: a speech/normative qualification. In Hart's view, the latter usually rests on "positive"/factual conditions and implies absence of "negative" conditions not directly related to a description of an observed fact (e.g., "psychological" or "mental" factors, such as deception, mistake, intoxication, mental disorder, provocation, and so on). Contrary to positive conditions, the negative ones are substantially heterogeneous, numerically endless, procedurally specific and usually do not require confirmation of their existence. So in order to understand a proper application of a concept of contract, it is not enough to know only its positive conditions (a presence of two parties, an offer and an acceptance, a memorandum, etc.). We also need knowledge of various defences or exceptions, i.e. negative conditions (misrepresentation, coercion, undue influence, contradiction with purposes of law, change of circumstance, and so forth), which in case of their instantiation can defeat a claim of a (presence of) valid contract or can restrict its use (Ibid., p. 148).

Hart's idea of defeasibility can be seen to include "logical-procedural" and "factual-relational" components (Kasatkin, 2014, Ch. 2, § 3). In its logical-procedural aspect defeasibility involves *asymmetry and mutual irreducibility* of positive and negative conditions of application of a legal concept, which are associated with structural features of legal reasoning. In particular, in Hart's text these types of conditions vary a) in their necessity and sufficiency for the proper ascription/qualification; b) in their dependence on the other type of conditions within a system of grounds of ascription; c) in their ability to neutralize the other type of conditions; and d) in their prima facie and proof status in a system of reasons of language use. Hence the negative conditions stressed by the author are not necessary and sufficient for ascription – they depend on the positive conditions, are able to neutralize them partially or fully (and with retroactive force), and they are also generally assumed to be absent and not requiring their proof (Ibid.). From this point of view unification of conditions (or transformation of the negative conditions into the positive ones) that are distinctive for the discussed deductive model, though technically possible, according to Hart, is "vacuous" (Hart, 1951, p. 152), because it ignores actual speech practice with its asymmetry of reasons for application of legal concepts.

In its factual-relational aspect defeasibility emphasizes a *special role of a fact and a type of its connection with a concept (a term)* in characteristic legal statements distinct from the empirical discourse (or its theoretical model). It shows facts in a system of grounds of ascription (legal reasoning), where they serve not as referents of legal (and, in general, "social") concepts, but only as some of normatively stipulated conditions of their use, that, in absence of other claims or circumstances, can support/legitimize speech imputation (a normative conclusion) (Kasatkin, 2014, Ch. 2, § 3).

A result of Hart's speculations in the 1949 essay is as follows. On the one hand, it is recognition of inadequacy of a traditional descriptive logical-deductive model of judicial decision, which simplifies/distorts actual legal-discursive practices, ignores their important features. On the other hand, it is supersession of description with a model of non-descriptive uses

(á la performative) with a complex, open, non-monotonic structure of grounds of their production/relevance, allowing revision of original grounds and conclusions. Judicial decision is a speech act of ascribing legal statuses and meanings substantiated by facts and "felicitous" in absence of other claims and circumstances.

The conception of legal indeterminacy (1958). In his subsequent works, Hart continues to criticize the logical-deductive model of judicial decision, but in different contexts with different aims, theses and argumentations. In the 1958 essay and further such criticism is developed by the author in light of justification of positivism and, in particular, of norms' ability to predetermine an outcome of a legal case.

Thus, supporting a challenge of American legal realism, Hart contests "*formalism*" as a theory and judicial practice that is understood as a judge's mechanical deduction of an answer predetermined in law. The author emphasizes fundamental *indeterminacy* of the law/discourse, when along with clear instances of language use (a "*core*" of meaning) there are borderline cases ("*penumbra*"). The latter generate situations where application of a term, and so of a legal rule, is not strictly dictated by linguistic conventions and requires a judge to make one's choice, i.e. to exercise discretion (for example, a choice/discretion as to whether some prohibition of vehicles in a park embraces planes, bicycles, or toy cars?) (Hart, 1983b, p. 63). Later this feature of language and normative regulation to be vague or indeterminate in its application to borderline cases will be famously called an "*open texture*" (Hart, 1994, Ch. 7). Hence, Hart firstly rejects formalism (distinguishing it from positivism) that ignores situations of indeterminacy undermining deduction. Secondly, he associates rationality of conclusion not with logic (as only a formal hypothetical connection between premises and consequences (Hart, 1983b, p. 67)), but with art of interpretation and qualification of particulars, i.e. with establishing meaning of relevant legal rules and their relation to concrete situations. Thirdly, he refuses a practice of "blind" decisions tied up with formalism – the philosopher's ideal is associated with a responsible, deliberate legal act, when a judge understands the presence of indeterminacy and (while interpreting a term/a rule) makes an informed choice, also taking into account social objectives, values, consequences (Hart, 1983b, S. III; Kasatkin, 2016).

Along with the above said, Hart advances a number of his positions concerning the judicial decision, which differ from views of other critics of formalism.

1) Non-identity of "blind" decisions with an "*abuse of logic*" or "analytical methods". In the author's opinion an "*error of formalism*" takes place when a judge does not see multiplicity of interpretations of a term/a rule at "penumbra" circumstances, a possibility of one's choice. Instead, a judge either fixes their meaning being guided not by social goals but by some everyday or distinct legal context or making up an ordinary interpretation with arbitrary universalized features. Or, more often and on the contrary, a judge makes a rational choice out of other political/value considerations – conservative ideals or a belief in greater justice of using everyday language (Hart, 1983b, p. 66–68).

2) Limitation of judicial discretion. According to Hart, in spite of "norm-sceptics"' (American legal realists) and proponents of natural law there is a hard "core" of meaning/norm. On the one hand, it provides a decision in clear cases, on the other hand, it limits (or is able to limit) a judge's choice to "penumbra" situations, while forming a basis and guides for exercising discretion (Ibid., p. 71–72).

3) Separation of legal rules and political/moral guidelines. Hart argues that these guidelines, being relevant in situations of "penumbra", are

preferably to be (theoretically and practically) considered separately in order to keep rules' "core" meaning and to have more clarity in the use of such considerations in judicial argument (Ibid.).

4) Diversity of the ought. Contrary to the natural law theorists, appeals to the ought in borderline cases, in the author's view, are not equal with appeals to morality – the "ought" has different meanings or grounds of use, including what could be evaluated as an "immoral" ought (like in the case of Nazi law) (Ibid., p. 68–70).

5) Distinguishing description and evaluation. According to the philosopher, it is necessary to separate reasonableness/morality of a judicial decision and its legal validity – even a decision with "vices" of formalism may be appropriate from a perspective of accepted official conventions (i.e. may preserve legal force) (Ibid., p. 68–70, etc.).

The general result of Hart's reflections in the 1958 essay is the simultaneous recognition and de-centration of logical deduction within legal reasoning, the repudiation of formalism as a basic model of judicial decision, as well as the justification of complexity and openness of legal argumentation with an emphasis on procedures of interpretation, qualification and moderate judicial discretion in borderline cases.

Conclusion. Thus, being different in aims, theses, arguments and so on, Hart's 1949–1958 constructions overlap in demonstrating narrowness and/or inadequacy of the deductive model of judicial decision as to the representation of actual practices of legal discourse, peculiarities of normative reasoning and operations by judge within a case. In the author's thought, the traditional logical-deductive model neither explains a nature and functions of speech acts performed in and outside courts, nor a method and peculiarities of establishing connection between legal concepts and their referents, nor openness and complexity of grounds of judicial reasoning, nor a limited role of logical tools in producing legal conclusions. However, regardless of a degree of diversity of concepts, rules and facts within a case, as well as a degree of complexity of practical-analytical tasks before court and parties, characteristic judicial (and analogical) statements are interpreted by Hart as conclusions of law, i.e. inferences arising from norms and facts (Hart, 1951, p. 154–156; 1983b, p. 28 etc.; 1955, S. IV–V). Underlining a status of judicial utterances as decisions and not as descriptions in the 1949 essay (Hart, 1951, p. 155–156), Hart does not imply their arbitrariness or determination by the (unlimited) judicial discretion, but, on the contrary, he accents their normative character, a speech act with social/normative effects that has its own conditions of relevance and evaluation. Hence, the author, indeed, does not deny a deductive method and a theoretical model of judicial reasoning as such. Rather, he repudiates their certain kind, status and claims to universality (related to philosophy of a logical analysis and a jurisprudential doctrine of formalism). This, in turn, allows application of the apparatus of logic (and logical deduction) to the law and judicial decision, while accounting for their limited role in a legal and social practice, and so in the theory and methodology of jurisprudence.

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Критика дедуктивной модели судебного решения в работах Герберта Харта 1949 и 1958 гг.

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В статье обсуждаются дефекты/ограничения (распространенной в континентальной юриспруденции) логико-дедуктивной модели решения, представленные в «ранних» (и реже обсуждаемых) концепциях известного британского философа Г.Л.А. Харта: в его доктрине аскриптивизма и отменяемости понятий 1949 года и доктрине правовой неопределенности 1958 года. Согласно философу, логико-дедуктивная модель не дает надлежащего объяснения: а) характера и функций правовых речевых актов; б) способа и особенностей установления связи правовых понятий и их референтов; в) открытости и сложности оснований судебной аргументации; г) ограниченной роли логических средств в производстве юридического вывода; и т.п. Вместе с тем характерные судебные и близкие им высказывания трактуются Хартом

именно в качестве юридических выводов, т.е. заключений, проистекающих из норм и фактов. Отсюда, вопреки заявлениям автора, он, по сути, отрицает не судебную дедукцию как таковую, но скорее определенный ее вид, статус и претензии на универсальность. Это, в свою очередь, допускает применение к праву и судебному решению аппарата логики при понимании их ограниченной роли в юридической и социальной практике, в теории и методологии юриспруденции.

Ключевые слова: Г.Л.А. Харт, судебное решение, логика в праве, юридический язык, аскриптивность, отменяемость, неопределенность в праве, аналитическая философия права, формализм, юридический позитивизм.

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